IN THE
MISSOURI SUPREME COURT

SC 94096

STATE OF MISSOURI,

Appellant,

v.

MARCUS MERRITT,

Respondent.

Appeal from the St. Louis City Circuit Court
Twenty-Second Judicial Circuit
The Honorable John F. Garvey, Jr., Judge

BRIEF OF AMICUS CURIAE SENATOR SCHAEFER FILED WITH CONSENT OF THE PARTIES

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INTEREST OF THE AMICUS

Pursuant to Rule 84.05(f), Senator Kurt Schaefer, a member of the Missouri Senate and sponsor of Senate Joint Resolution 36 ("SJR 36"), submits this amicus brief to aid the Court in its consideration of the meaning of the recent amendment to the right to bear arms contained within Article I, Sec. 23 of the Missouri Constitution. Senator Schaefer is uniquely able to provide insight into the facts and circumstances of the recent amendment as the members of the Senate drafted, debated, and passed SJR 36, the initiating action for the constitutional amendment. "[T]he legislature, in proposing an amendment, is not exercising its ordinary legislative power but is acting as a special organ of government for the purpose of constitutional amendment." *State ex inf. McKittrick ex rel. Ham v. Kirby,* 163 S.W.2d 990, 993 - 4 (Mo. 1942). As such, the statements and understanding of the legislators present at the initiation of such action are helpful in construing the meaning of the provisions at issue. *See* 2B Sutherland Statutory Construction § 48:4 (7th ed. 2008). This includes observations regarding the contemporary circumstances surrounding SJR 36's passage.

ARGUMENT

Introduction

Just a few short months ago, this Court considered the propriety of Senate Joint Resolution 36's ballot language in *Dotson v. Kander*, 435 S.W.3d 643, 644 (Mo. 2014). Over the objection of SJR 36's opponents, the Court allowed the measure to go forward on the ballot, albeit due to the procedural impropriety of the challenge. However, as stated by the SJR 36's sponsors at that time, even if considered on the substance, SJR 36's actual purpose was exactly what was stated on the ballot summary:

> Shall the Missouri Constitution be amended to include a declaration that the right to keep and bear arms is an unalienable right and that the state government is obligated to uphold that right?

2014 Senate S.J.R. 36, pg. 2.

SJR 36 was not an attempt to create a right to bear arms in a completely unfettered manner; rather, it was designed to bring Missouri's Constitution in line with the landmark U.S. Supreme Court decisions of *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010). *Heller* and *McDonald* recognized that the Second Amendment's right to bear arms

is a fundamental right held by all law abiding citizens—SJR 36 enshrined that understanding within our own state's constitution.

However, that mandate does not extend to Merritt. Mr. Merritt is not among those persons whom SJR 36 and the Second Amendment seek to protect, for the same reason that he was not among the voters who overwhelming passed the ballot measure in August: he is a felon. As such, he is not able to avail himself of certain rights and privileges, including those granted to law-abiding citizens contained within the Second Amendment and Art. I, Sec. 23. This should come as no surprise.

Section 23 was never intended to upend important public safety statutes like the felon in possession statute at issue here, Sec. 571.070.1, RSMo. Like *Heller* noted with the Second Amendment, nothing in amended Section 23 "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons..." 554 U.S. at 626-7. Missouri's prohibition on felons possessing firearms is unique in that its consideration was nearly contemporaneous to that of SJR 36. In the same session where SJR 36 was considered and passed, the General Assembly passed the most extensive overhaul of the criminal code in over 30 years with Senate Bill 491.

In SB 491, the Senate expressly considered the classification of every crime in the revised code, deeming what sorts of conduct should be considered felonious.

This deliberation was made with full understanding that classifying a crime as a felony would create numerous collateral consequences, including that imposed by Sec. 571.070.1. But Chapter 571 was left unchanged. 2B Sutherland Statutory Construction § 49:9 (7th ed. 2008). For Merritt to prevail here, this Court would have to believe that thirteen days after completing a historic legislative effort spanning nine years and memorialized in a 645 page bill, that same chamber intended to invalidate through a constitutional amendment a statute that survived an overhaul of the code wholly intact. This is not the case. SJR 36 was submitted to the voters to protect the rights of law-abiding citizens to possess arms in lawful defense, not to restore the rights of all felons through blanket legislative fiat.

The trial court's judgment should be reversed.

I. As Senate Joint Resolution 36 brought Article 1, Section 23 into harmony with modern Second Amendment jurisprudence, public safety statutes like Sec. 571.070.1 are presumably valid.

In discerning the meaning of a constitutional amendment, the Court should discern the contemporary understanding of the change. Or more simply put, "Having the existing state of the law before them [during adoption], what must the sponsors of the amendment and the voters have understood when they adopted the

[amendment]?" *Moore v. Brown*, 165 S.W.2d 657, 661 (Mo. 1942). This amicus can certainly speak to the former consideration.

Prior to 2008, Supreme Court authority on the Second Amendment was scant at best, leading to much speculation regarding the contours, and even the fundamental nature of the right. In *District of Columbia v. Heller,* the Supreme Court authoritatively settled many of these questions, holding that the right to keep and bear arms was an individual right held by law-abiding citizens. 554 U.S. at 608-11. As such, the government cannot constitutionally enact blanket prohibitions on private firearm ownership. *Id.* This right was later incorporated as to the states under the 14th Amendment in *McDonald v. City of Chicago, Ill.,* 561 U.S. 742, 755 (2010).

Given these developments, the sponsors of SJR 36 sought to modernize Missouri's constitutional provision with that of the contemporary understanding of the Second Amendment:

> The clear purposes of SJR 36 are to bring the Missouri constitution in line with *Heller* and *McDonald*, to ensure that the Missouri right to keep and bear arms remains coextensive with the federal right explicated in *Heller* and *McDonald*, and to provide a prophylactic against

> legislative or judicial action that would violate *McDonald*.

Dotson v. Kander, 2014 WL 3706819, at 14 (*Brief of Respondent Schaefer, Case No. SC94293*).

If the Court accepts this understanding of SJR 36, as it should, then Sec. 571.070.1 must be upheld as felon in possession statutes are presumably constitutional under the Second Amendment. In realizing the historic nature of its decision in *Heller*, the Supreme Court provided strong dicta to guide legislators and the courts regarding the boundaries of the Second Amendment:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 626-7, fn. 26.

Given this guidance, nearly all public safety statutes, including those practically identical to Sec. 571.070.1, have been held to survive constitutional scrutiny under the Second Amendment. *U.S. v. Joos*, 638 F.3d 581, 586 (8th Cir. 2011) (upholding federal felon-in-possession statute); *U.S. v. Carter*, 75 F.3d 8,

13 (1st Cir. 2014) (upholding federal statute prohibiting possession by domestic violence misdemeanants); *U.S. v. Carter*, 750 F.3d 462, 467 (4th Cir. 2014) (upholding statute prohibiting possession by illicit drug users); *U.S. v. Izaguirre-De La Cruz,* 510 Fed. Appx. 233 (4th Cir. 2013) (upholding ban on possession by illegal aliens); *National Rifle Ass'n of America, Inc. v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013) (upholding Texas ban on handgun possession by those under 21 years old); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261-63 (11th Cir. 2012) (upholding Georgia's ban on carrying firearms in places of worship); *U.S. v. Mudlock*, 483 Fed. Appx. 823, 828 (4th Cir. 2012) (upholding prohibition on possession by those subject to a domestic restraining order). The Courts have recognized that the legislature may constitutionally limit the access of certain classes of people, most notably those who would commit serious violations of the law or place a unique danger to the public, to firearms.

This is not to say that *Heller* and *McDonald* lack bite. Blanket prohibitions on the law-abiding public's general right to bear arms offend the Second Amendment and have been quickly struck down. *See e.g. Peruta v. County of San Diego*, 742 F.3d 1144, 1168-70 (9th Cir. 2014) (invalidating law requiring a law-abiding citizen to show a "pressing need" for a license to carry a weapon, whether concealed or not, in public). As *Heller* made clear, "[a] statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms

to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." *Heller,* 554 U.S. at 629.

A felon-in-possession statute is not, by its nature, a regulation that burdens the general right of the public to keep and bear arms, much less one that "amounts to [its] destruction." While Sec. 571.070.1 may burden certain individuals' rights to bear arms, it does not purport to establish any restrictions on the general public. As such, if the Court adopts the interpretation intended by SJR 36's sponsors and the public's understanding, and finds that amended Section 23 enshrines a right to bear arms co-extensive with that of the Second Amendment, it should uphold the statute as presumably lawful as set forth in *Heller*.

Indeed, Merritt's argument against Sec. 571.070 only holds if he is able to point to some provision in SJR 36 that extends the right to bear arms beyond that of the Second Amendment. There are only three textual additions that could even be argued to implicate the constitutionality of public safety statutes like Sec. 571.070: the "strict scrutiny" clause, the "unalienability" clause, and the "preservation clause" ("Nothing in this section…"). In each case, a plain reading can only lead to the conclusion that the sponsors and the voters did not intend to blindly reinstate the rights of felons through implied constitutional fiat.

II. No provision of Senate Joint Resolution 36 extends the right to keep and bear arms beyond the Second Amendment to inure to the benefit of convicted felons like Merritt.

A. Rather than creating a conflict, the "Strict Scrutiny" Provision harmonizes Section 23 with the Second Amendment

The first major provision of SJR 36 provides that "[a]ny restriction on these rights shall be subject to strict scrutiny…" While new, this addition does not bring Section 23 out of step with the Second Amendment. While *Heller* did not clearly set forth the proper level of scrutiny, the Supreme Court answered the question in *McDonald* through its incorporation analysis, finding the right to be fundamental. *McDonald*, 130 S. Ct. at 3042 & 3026. Recent federal authority has thus employed the "strict scrutiny" standard when undertaking a constitutional analysis of a regulation of a "core right" of the Second Amendment. *Gowder v. City of Chicago*, 923 F.Supp.2d 1110, 1123 (N.D. Ill. 2012); *Morris v. U.S. Army Corps of Engineers*, 990 F.Supp.2d 1082, 1086 (D. Idaho 2014). While some authority may analyze discrete public safety statutes under intermediate scrutiny, this is not due to disparagement of the Second Amendment. Rather, these courts recognize that the core right to keep and bear arms in the Second Amendment is the right of the law-abiding public.

B. The rights set forth in Section 23 only apply to "citizens" which necessarily excludes convicted felons

As a threshold matter, the Court must decide whether Merritt is even of the class of persons protected by Section 23. Indeed, the "strict scrutiny" standard only applies if the restriction in question actually burdens the right set forth in Section 23. Similar to free speech jurisprudence, though the right is fundamental, certain types of conduct necessarily falls outside the right due to historical and public policy reasons. *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011). Likewise, firearm ownership only falls within the Second Amendment, to the point of triggering strict scrutiny when the "law [in question] burdens the core of the Second Amendment guarantee… 'the right of *law-abiding*, responsible citizens to use arms in defense of hearth and home,'" *National Rifle Ass'n of America, Inc. v. McCraw,* 719 F.3d 338, 348 (5th Cir. 2013) (emphasis added). Thus, "felon-based firearm bans… do not impose a burden on conduct falling *within* the scope of the [right to bear arms]" such to give rise to strict scrutiny. *People v. Campbell,* 8 N.E.3d 1229, 1241 (Ill. App. 2014) (emphasis added).

Not only does Section 23 accord with this understanding of the Second Amendment, Missouri's delineation is even more explicit. When setting forth the right, Section 23 only speaks to a "citizen's" right to bear arms for defense or "when lawfully summoned in aid of the civil power" as opposed to the more

generic use of "person" or "the people" as used elsewhere in the Missouri Constitution. *Compare with* Art. I, Sec. 5 ("That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences."); Art. I, Sec. 8 ("that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject…"); Art. I, Sec. 10 ("That no person shall be deprived of life, liberty or property without due process of law.") This distinction is consequential.

As the Utah Supreme Court noted when considering whether its own felon-in-possession statute offended its state constitutional right to bear arms, the use of the word "citizen" indicates an intent to exclude felons. *Pohlabel v. State*, 268 P.3d 1264, 1270 (Nev. 2012). "A 'citizen' [may be defined as] '[a] person who ... is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of a civil state, entitled to all its privileges.'" *Id.* (citing *Black's Law Dictionary* 278 (9th ed. 2009)). Under this definition, "citizenship is a status, which entails individuals to a specific set of universal rights granted by the state." *Id.* As the *Pohlabel* court noted, when a felon is granted executive clemency or other relief from collateral consequences of conviction, it is often called a "restoration of citizenship." *Id.* at 1270-2. Thus, with the use of the word "citizens" rather than "the people," there is an implicit exclusion for felons and other groups who lack full rights of

"citizenship" from the scope of the text. *Id.* at 1271.; *See also* Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms,* 85 N.Y.U. L. Rev. 1521, 1528-30 (Nov. 2010). Missouri's conception of "citizenship" is similar to that of Nevada. *Magruder v. Petre*, 690 S.W.2d 830, 831 (Mo. App. W.D. 1985) (discussing "restoration of citizenship rights" for purposes of office disqualification statute).

Because of this, the failure of some federal authority to apply strict scrutiny to questions involving felons and other groups does not create an inference that Section 23's prescription of the standard extends a right beyond the Second Amendment. Most importantly, even if such a distinction can be made, a felon like Merritt does not fall within the purview of the right enshrined in Section 23.

C. *The "unalienability clause" does not extend Section 23's right to bear arms beyond the Second Amendment to grant Merritt relief from Sec. 571.070*

The second major addition to Section 23 is that "[t]he rights guaranteed by this section shall be unalienable." By declaring the right to bear arms as "unalienable" or "inalienable" [1] SJR 36 sought to ensure that the right to bear arms

[1] In modern parlance, the terms "inalienable" and "unalienable" are interchangeable terms for the same proposition. Brett W. King, Wild, Political

would be treated with the legal dignity entitled to other "fundamental rights." *See State v. Owens*, 259 S.W. 100, 103-4 (Mo. banc 1924) ("For the *inalienable* rights of personal security and safety, orderly and due process of law, are the *fundamentals* of the social compact") (emphasis added). While the clause and term accords Section 23 the status of those rights which "may not be submitted to vote; they depend on the outcome of no elections" that does not mean that the right is unlimited. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Instead, deeming the right to bear arms as unalienable serves several important consideration, none of which aid Merritt.

First, by deeming the right inalienable, the voters have sent a message regarding their own evaluation of the importance and priority of the right's protection. However, this does not mean that it is an obligation that extends to Merritt, as his right to bear arms has been forfeited due to his felony conviction.

To be sure, in a literal sense, the dictionary definition of the term "inalienable" means "incapable of being alienated, surrendered, or transferred." *Webster's Third International Dictionary; Morrison v. State,* 252 S.W.2d 97, 101 (Mo. App. 1952) ("Inalienable is defined as incapable of being surrendered or transferred; at least without one's consent."). However, this does not mean that

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Dreaming: Historical Context, Popular Sovereignty, And Supermajority Rules, 2 U. Pa. J. Const. L. 609 (2000).

the right cannot be forfeited for malfeasance through "due process of law." *Barber v. Time, Inc*., 159 S.W.2d 291, 294 (Mo. 1942) ("[T]he individual does not exist solely for the state or society but has inalienable rights which cannot be lawfully taken from him, so long as he behaves properly.") Even the most fundamental of "inalienable" rights, the right to life, can be forfeited based on the commission of a crime. Instead, the practical function of adding this provision makes sense if taken in the context of pre-*Heller* jurisprudence.

Prior to the *Heller* ruling, some legal scholars had argued that whatever meaning the right to bear arms once had for individuals; the right had been subsumed by the standing militias of the several states. *Heller,* 554 U.S. at 595-600; *See also Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996). *Heller* clarified that the right to bear arms was a right retained by "the people." *Id.* at 591-2. The "unalienability" clause makes *Heller's* conclusion explicit—that the right to bear arms is one of the people, and cannot be constitutionally "transferred or surrendered" to the custodianship of the government.

This clause does not afford Merritt any help given that his forfeiture was through "due process of law." The unalienability clause does not provide a basis to contest the constitutionality of Sec. 571.070.1.

D. The preservation clause does not purport to state the exclusive restrictions that may constitutionally govern Section 23's right to bear arms

The final major addition in SJR 36 is a preservation clause for certain restrictions that are per se proper under the law.

> Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.

2014 S.J.R. 36, pp. 1-2.

This provision does not purport to enumerate the only permissible regulations on the right to bear arms. Nor should it be read to implicitly restore the rights of thousands of "non-violent" felons to own firearms through implication. If the sponsors and the voters wished to place such a severe restriction on the General Assembly's plenary power, or create such a massive change to criminal justice system, the language would be explicit. Instead, the purpose and effect of the clause is to eliminate any doubt that laws keeping guns out of the hands of convicted violent felons and the mentally ill are constitutional under any standard of review.

Any attempt to distort the preservation clause into an exhaustive list of all permissible regulations on the right to bear arms not only misconstrues the text, but also the fundamental nature of state legislative power. "The state constitution, unlike the federal constitution, is not a grant of power, but as to legislative power, it is only a limitation; and, therefore, except for the restrictions imposed by the state constitution, the power of the state legislature is unlimited and practically absolute." *Kansas City v. Fishman*, 362 Mo. 352, 241 S.W.2d 377 (1951). Because of its nature as a state sovereign body, the General Assembly does not need specific constitutional grants of legislative authority to act on a given subject matter like Congress. Restricting the General Assembly's authority to only "violent felons" and the "mentally ill" would be akin to treating it as mere administrative agency with limited authority to act within strict statutory confines, rather than a sovereign body carrying out the public's mandate.

Simply put, bringing Section 23 into harmony with the Second Amendment through the passage of SJR 36 did not automatically nullify the "presumably lawful" series of regulations set forth in *Heller,* including such restrictions as contained in Sec. 571.070. Whether analyzed by its overall purpose or by strict parsing of its individual clauses, SJR 36 was not designed, drafted or promoted to grant Merritt the immunity accorded to him by the trial court. Public safety and the right to bear arms are not either/or propositions. SJR 36 sought to ensure that

law-abiding citizens would continue to enjoy the fundamental right to defend themselves and their families against those who would trample on their rights and livelihoods. To construe the right any other way would be to find a constitutional defect where none naturally arises.

CONCLUSION

The trial court's judgment should be reversed.

Respectfully Submitted,

/s/Kurt U. Schaefer
Kurt U. Schaefer #45829
314 East High Street
Jefferson City, MO 65101
Telephone: 573-761-5008
Facsimile: 573-893-5398
Kschaefer@lathropgage.com

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

This brief complies with the type-volume limitation of Rule 84.06 because this brief contains less than 4,361 words, excluding the parts of the brief exempted by Rule 84.06(b). This brief complies with the typeface and type style requirements of Rule 84.06(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14-point Times New Roman. The electronic files filed with the Court and served on opposing counsel have been scanned for viruses and are virus free.

/s/ Kurt U. Schaefer
Kurt U. Schaefer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 24, 2014, a copy of the foregoing was served via the Court's electronic filing system on the counsel of record below who have registered with Missouri's electronic filing system:

Jennifer Ann Rodewald
Office of the Attorney General
P.O. Box 899
Jefferson City, MO 65102

Matthew William Huckeby
1010 Market, Ste. 1100
St. Louis, MO 63101

/s/ Kurt U. Schaefer
Kurt U. Schaefer